

THE OFFICIAL PUBLICATION OF THE ASSOCIATION OF WORKPLACE INVESTIGATORS

## Digital Information in Investigations — And Getting Help from the Experts

By Sara Church Reese and Julie Lewis

Most workplace investigations do not require high levels of digital sleuthing. The scope of investigations is usually fairly straightforward, and the relevant documents are undisputed: the client’s employee manual, a performance write-up, work schedules or time records identifying potential witnesses, a list of attendees at a particular meeting. And the key information will come from human witnesses.

However, in some investigations, digital forensics—done correctly and documented thoroughly with the help of outside experts—can be a vital part of gathering relevant evidence and reaching an appropriate and defensible result.

Today’s investigators need to know what electronically stored information exists and have at least a cursory understanding of whether and how it can be retrieved. And in cases involving common electronic data, such as emails and images on cell phones, investigators should know how the information can be properly secured to avoid corrupting it.

A basic knowledge of the inner workings of digital forensics also enables investigators to frame appropriate questions in cases in which such information may be an issue, even when outside forensics experts are hired to do the heavy lifting of retrieving it.

### When to Analyze Digital Evidence

In some situations, however, investigators will want to devote more thought to the potential role of digital forensics.

Common examples may include disputes around the authenticity of documents—such as when one witness claims to have received offensive emails and the alleged sender denies having sent them, or alleged harassment by telephone calls or text messages, where the investigator needs to nail down what devices sent or received communications.



### Where to Find the Data

Relevant data that may need to be plumbed can be found in a number of places:

- Internal, employer-controlled sources,
- External, employee-controlled sources, and
- Open sources, controlled by third parties.

#### Internal sources of data

Where necessary, investigators should brainstorm with clients to discern where potentially relevant information may be found, particularly if they are not familiar with the business or systems used. The client’s internal sources are usually addressed first, due to the reality that they can be quickly accessed and the data can be preserved. Note that most workplaces have policies in place regarding personal devices—and a best first step for investigators is to become familiar with those policies if personal devices become an issue in an investigation. As cautioned here, they should not attempt to access personal devices without consulting with the clients or following internal protocols.

Common internal candidates may include company desktops, laptops, servers, smartphones, security badge access data, and cloud accounts. But unexpected sources of internal data may also provide valuable information about the timing and people involved in various tasks. In appropriate investigations, for example, forensic analysis may also include video cameras, car “infotainment” systems, vehicle tracking location systems, boat navigation systems, and inventory management data.

***Example:** A workplace investigation focused on alleged harassment of a gay male employee by a female colleague. The complainant reported that his co-worker made a vicious comment about his sexu-*

Susan Woolley  
Editor  
Barbara Kate Repa  
Managing Editor

Published quarterly by the  
Association of Workplace Investigators, Inc.  
1000 Westgate Drive, Suite 252  
St. Paul, MN 55114 USA  
844.422.2294  
www.awi.org  
awijournal@awi.org

The mission of the Association of Workplace Investigators is to promote and enhance the quality of impartial workplace investigations.

All articles are Copyright 2020 by Association of Workplace Investigators, Inc., unless otherwise specified. All rights are reserved. Articles may not be republished in any manner without the express written permission of the copyright holder. Republication requests may be sent to awijournal@awi.org. The opinions expressed in this publication are solely the opinions of the authors. They are not the opinions of the Association of Workplace Investigators, Inc.

If you are interested in writing for the *AWI Journal*, please send an abstract describing the topic you will be covering to awijournal@awi.org. Our articles focus on the many different aspects of workplace investigations, including how the law applies to the work of investigators, practical matters, similarities and differences between workplace investigations and other fields of endeavor, developments and trends in the law and profession, and book reviews.

Letters to the editor are welcome; email awijournal@awi.org. Nothing contained in this publication constitutes legal advice.

ISSN 2328-515X (print)  
ISSN 2328-5168 (online)



## President's Message

I begin by acknowledging a woman who was a hero to me and so many others.

The Honorable Ruth Bader Ginsburg passed away on September 18, 2020. Her commitment to justice and equality for all Americans will forever live on in many of our hearts and minds. The “Notorious RBG” paved the way for me and many other AWI members to attend law school and become attorneys.

After Justice Ginsburg died, I read a number of tributes to her—many including her inspiring quotes. My favorite is: “In every good marriage, it helps to sometimes be a little deaf.” Replace the word “marriage” with many other words, such as partnership or friendship, and the quote resonates even more.

Perhaps even more applicable to our professional lives is the urging from RBG: “Fight for the things you care about, but do it in a way that will lead others to join you.” AWI’s mission is to promote and enhance the quality of impartial workplace investigations. As an organization and as individuals, we embrace diversity and inclusion in the workplace and in society in general. Hopefully, the work we do will inspire others to join us in advocating for diversity and inclusion for all.

Several of our AWI members have kept on in these uncertain times, setting examples with their leadership. AWI is currently poised to hold its first, and hopefully only, virtual annual conference. A huge thanks to conference chair Jennifer Doughty and her committee members for making that happen.

And congratulations to Jennifer and to Cate Moss, AWI’s two newest board members. We will miss Elizabeth Rita and Emily Kaufer, who are stepping down from the board, but are excited to have Jen and Cate join us. Congratulations also go to Donna Evans and Oliver McKinstry, the recipients of AWI’s Achievement Award, otherwise known as our “volunteers of the year.”

I hope all of you are able to find something positive to remember about the year 2020. As it relates to AWI, and life in general, I will remember this as the year we learned to be flexible and to pivot when we were unable to proceed as planned.

The Seminar & Webinar Committee did just that. The committee, led by Liz Rita, went above and beyond this year to bring you 16 webinars and 6 multiday virtual seminars.

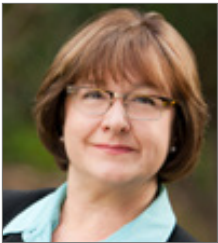
AWI’s Marketing and Membership Committee, led by Carole Ross, also stepped up. The committee members realized that in the new virtual world we live in, we can increase our number of “local circles” so that those who were otherwise unable to participate can now do so thanks to Zoom.

And the Training Institute Committee, led by Monica Jeffrey and Eli Makus, also worked hard. By the end of the year, the committee offered two workshops on report writing, similar to the half-day module offered as part of the Training Institute. In addition, Monica and Eli are currently developing a virtual institute for 2021. Those of you who have attended an institute in person understand what a massive undertaking that is and how difficult it will be to replicate the experience, but those committee leaders are committed to making that happen to the extent feasible.

We also have a subcommittee, led by Jeremy Eaves and Sue Ann Van Dermeyden, developing an advanced Training Institute that we hope to roll out in 2021.

Finally, I urge our members to help lead by getting involved with AWI by joining a committee, writing an article for the *AWI Journal*, or attending AWI’s virtual events—including local circles and educational programs.

Karen Kramer  
President of the Board of Directors  
Karen@kramerlaw.net



## Letter From the Editor

Dear Friends and Colleagues,

Tonight, I'm a happy, exhausted wreck because the Dodgers just won the World Series. I am a Dodgers fan because my mother inspired me to be one. My mom loved the Dodgers. Even as an old woman, she'd put on her blue and white checked shirt, blue sneakers, and Dodgers cap and make the trek to Chavez Ravine. She cheered for the great Dodgers teams and kept the faith during the dry spells. Though far from a Pollyanna, my mom didn't give up, and she expected me to persevere as well.

During a tough year like this one, we all need inspiration. Who inspires you? A family member who always has a kind word? A friend who just doesn't give up? Or maybe a tiny, wise, brilliant woman who sat on the highest court in the United States for almost 30 years? Inspiration. Perseverance. Hope.

I hope that we inspire you to learn something new and stretch your skills with this issue. Sara Church Reese and Julie Lewis kick things off with an overview of digital evidence and using forensic experts in their article "Digital Information in Investigations—And Getting Help from Forensics Experts." As more and more information is generated every time anyone turns on a device, investigators need to know what types of evidence exist and how it can safely be accessed.

The body of law around workplace investigations continues to grow. Though we still are not overwhelmed with investigations jurisprudence, it behooves lawyers and non-lawyers alike to be aware of developments in the law. Alissa Oduro, Mike Tontillo, and Sean McKinley give us an update on some significant new cases in "Case Law Cautions for Investigators."

Feeling overwhelmed at work? Breanna Jones and Emily Getty explain the benefits paralegals can bring to an investigations practice. Breanna and Emily discuss the legal framework within which California paralegals work, and also describe some of the ways a paralegal can help an investigator keep all those balls in the air, from managing documents, to drafting witness summaries, to keeping the lights on. Thank you, Breanna and Emily, for the insider's view.

And Ann Boss has written a thoughtful note on the recent case of *King v. U.S. Bank National Association*. I know my fellow investigations nerds will be pretty excited about this decision because the California Court of Appeals found that a seriously deficient investigation could give rise to liability for defamation, among other things. Ann's note merits a close read and this case goes into the "cautionary tales" file.

Finally, I am very pleased to say that two of our hard-working committee members, Lynn Lieber and Ann Boss, have agreed to step into leadership roles on the Publications Committee and that both will be joining Debra Reilly as vice chairs. Lynn and Ann are extremely brave to take on this task, and I am looking forward to working more closely with all of them.

As these wintry and shut-in days go on, I hope you find moments to reflect on what inspires you—whether it be in your work, your home, or your friendships. There's no doubt this has been a tough year. But imagine my adorable, gray-haired mom in her Dodgers cap, cheering even when winning was impossible.

And remember that hope is never lost.

Susan Woolley  
Editor, *AWI Journal*  
awijournal@awi.org

### EDITORIAL BOARD

Susan M. Woolley, Editor\*  
William D. Bishop Jr.  
Ann Boss  
Miles Grillo  
Lynn D. Lieber\*  
Jennifer A. MacKenzie  
Margaret E. Matejkovic  
Nora Quinn  
Sara Church Reese  
Debra L. Reilly  
Christina Ro-Connolly\*  
Judith A. Rosenberg  
Kathleen Sage  
Robyn Sembenini

### BOARD OF DIRECTORS

Karen Kramer\* President  
Eli Makus\* Vice President  
Monica Jeffrey\* Treasurer  
Terri Abad Levenfeld\* Secretary  
Keith Rohman\* Past President  
Britt-Marie Cole-Johnson\*  
Jennifer Doughty  
Jeremy Eaves  
Dinamary Horvath  
Reuben Mjaanes  
Cate Moss  
Cara Panebianco  
Sarah Rey  
Debra Schroeder  
John Torres

### \*SUSTAINING MEMBERS

Evelin Bailey  
Ian Bondsmith  
Nancy Bornn  
Carl Botterud  
Linda Burwell  
Zaneta Butscher Seidel  
Ashlyn Clark  
Kim DaSilva  
Leslie Ellis  
Donna Evans  
Fernando Flores  
Mark Flynn  
Kathy Gandara  
Elizabeth Gramigna  
Susan Hatmaker  
Barbara Johnson  
Aviva Kamm  
Sandra Lepson  
Michelle McGrath  
Marilou Mirkovich  
Julie Moore  
Lynn Morgenroth  
Trish Murphy  
Amy Oppenheimer  
Geraldine Patellaro  
Danielle Pender  
Elizabeth Rita  
Michael Robbins  
Christina Ro-Connolly  
Daniel Rowley  
Caroline Schuyler  
Jeff Sloan  
S. Brett Sutton  
Vida Thomas  
Alezah Trigueros  
Sue Ann Van Dermyden  
Allison West  
Lizbeth West  
Alison Winter  
Susan Woolley  
Sarah Worley  
Julie Yanow

ality as he entered the workplace and she exited. She denied making the comment and added that she hadn't come within 20 feet of him since learning of his complaint. The internal HR investigator reviewed security footage of the business entrances and exits, which unequivocally showed that the two had been within four or five feet of one another when the alleged comment was made. This information was important in assessing the credibility of the two witnesses.

#### External sources of data

External sources discussed here—especially smartphones and social media—are commonly controlled by the employee, and given the blurring of work and outside life in today's world, may play increasingly important roles in many workplace investigations.

As mentioned, with many employers allowing employees to purchase and use their own devices in the workplace, it is important to know if there are proper permissions for data analysis to be conducted. For example, for investigators to access that cool new iPhone or Mac computer that an employee purchased and also uses to store work data, the employee may need to sign a computer usage policy or personal device authorization.

It is typically very difficult—even in litigation with the benefit of subpoena power—to get web hosting companies or other tech entities to divulge information. Often the only way to get information from Slack, Dropbox, and other cloud-based systems is to go through the employee for access to an account.

Workarounds are sometimes available, however, and that is where digital forensics experts are usually essential. Typically, counsel for the company should also advise in such situations, because jurisdictions have differing levels of privacy protections.

***Example:** A company's board of directors received a claim that a former employee was stealing clients using its proprietary customer list. Nothing was revealed in searches of the client's email system. The former employee would not allow his phone to be imaged. However, based on imaging of the work computer, as allowed in the jurisdiction, it was discovered that the former employee had inadvertently backed up the personal iPhone using iTunes. Text messages retrieved in this way made clear that the former employee had the client's customer list and was soliciting clients for a new entity.*

**Smartphones.** While much potentially relevant information may be extracted from smartphones, email can rarely be retrieved from them because the database is encrypted. Depending on the nature of the allegation, the investigator may seek both active and deleted communications and contact history.

Unlike traditional desktops and laptops on which the examiner may perform a targeted and tailored preservation, with smartphones, the entire device generally needs to be imaged prior to converting con-

tent and communications into a readable form. This is an example of when an outside digital forensics expert will be required.

Other types of communications potentially available from the smartphone include information on apps such as WeChat, WhatsApp, and Skype. Thousands of combinations of devices and operating systems currently exist, so which communications can be extracted will depend on the device, operating system, existing applications, and encryption. Again, it is rare for the investigator—or even the client—to have the expertise to perform this level of forensic extraction. An outside expert is usually required, as discussed in more detail later in this article.

**Social media.** Another common type of external data is digital captures of social media content. In such searches, time can be especially important, warranting a capture before the account owner deletes potentially relevant posts. Investigators should be mindful that private social media accounts are just that—private—and should stick to publicly available material or posts to which they have legitimate access.

***Example:** In one recent investigation, a workplace-related disability complaint was submitted by an employee on a Monday morning. That same day, his wife's Facebook page contained publicly accessible posts about her husband being injured in a waterskiing accident over the weekend. Because a screenshot of this social media was captured so quickly, the information was immediately available to consider in preparing the investigation plan.*

If certain dates are key, a review of social media may show a lot of personal chatter during that period. The chatter could tend to corroborate or disprove reported events.

Sometimes website content can be indirectly useful. It may be relevant to know whether certain witnesses list each other as “friends” on Facebook, for example, or whether one witness has endorsed another on LinkedIn or a comparable site.

There are many sites on which one can look up social media accounts based on an email address, phone number, or other information. Also, sites such as Archive.org show website incarnations at different times. An investigator could likely do this work without an internal or external partner. For investigators who use paralegals or others to assist, such a task could be assigned to them.

***Example:** In the days before the COVID-19 shutdown, a whistleblower reported multiple instances of retaliation at work after she identified alleged improprieties. She stated that she had been forced to take medication for depression and anxiety, and had become a virtual shut-in, barely leaving the house other than to go to and from the office. Her social media posts during the period at issue were consistent with this testimony. Her archived posts*

were not. During the relevant period, she was shown being out to dinner with friends and participating in other activities.

### Open sources of data

Open-source intelligence, such as data posted by regulatory or licensing bodies, may sometimes be key in a workplace investigation. Investigators may typically plumb this information on their own, because it is fully public and accessible.

**Example:** *In one matter focused on a claim of theft of a company's proprietary information, publicly available information on a Secretary of State site revealed that the employee had started a business. Once that was known, the investigator checked for public-facing websites for the new enterprise, and incorporated the information into questions for witnesses.*

Such data may also be valuable when an employee's work activity has significantly dropped or there has been a behavioral change, and the reason is disputed within the scope of an investigation.

**Example:** *In one case, a valuable employee's behavior had changed in odd ways, and the employer sought to determine the cause before approaching the employee. The internal investigator reviewed the employee's personnel file, and then searched online to see what publicly available information might exist. The investigator used a search engine and discovered that a key professional license had been revoked, unknown to the employer. When probed, it was revealed the license was revoked because the employee had possessed a controlled substance.*

## Who Captures the Evidence?

There are some initial steps even investigators who are not tech-savvy can take in a digital forensics process, as long as the information is publicly accessible. But it may be soothing to know there are many knowledgeable outsiders to consult for help.

### Investigators

In a small-scale investigation involving only simple data retrieval, such as information gathered from social media or open sources, investigators may be up for the task themselves. For the most part, however, investigators need to be aware of the universe of information that may exist, but should not try to extract that information themselves.

### Organization's IT department

Large companies with internal investigation teams may have access to resources sophisticated enough to perform complex forensic processes in a workplace investigation.

But even internal IT staff knowledgeable about the information needs of the business may not be familiar with the unique processes involved in securing and analyzing data specifically for forensic purposes. Despite best intentions, mistakes may be made that im-

pede the investigation or become the subject of cross-examination down the road.

Client IT staff may be able to perform the data preservation and provide the information to the consultants—or secure the snapshots and hire outside experts to oversee the process for accuracy. One caveat: Any IT staffer used must not also be a fact witness integral to the investigation who may be called to testify about the merits of a complaint. Counsel or other appropriate decision-makers should be involved in determining protocol with a view toward potential future litigation.

### Outside forensics experts

Especially in high profile investigations involving attorneys in which every step may be contested down the road, it is sensible to hire an outside digital forensic firm to suggest the most reliable and defensible way to preserve and analyze digital data. Again, be mindful that if the case ends up going to court, the client may not want its own IT personnel serving as testifying experts.

A talented and experienced computer forensics examiner often may have ideas for tools, techniques, and data sources that the workplace investigator or client may not have considered. Also, outside experts know the most about the latest technology landscape, and are experienced in how to document each step taken.

If the client has internal IT personnel, or a vendor that regularly handles IT needs, those people can be vital partners to an outside forensics expert. They can speak to one another in their own language, and then explain things to the investigator and counsel involved. Even a limited scope project may prove very valuable. Sometimes the forensics expert can concur in the suggested process, then audit the result.

Bringing in an outside expert need not be an all-or-nothing decision. Sometimes an expert can be used as an occasional consultant as the investigation progresses. If an investigator is cross-examined down the road about the level of attention paid to electronically stored information, those documented consultations and resulting decisions can be helpful in responding to questions. An outside forensics expert may also be useful in issue spotting, such as alerting the investigator to differing global rules on investigations, when permissions may be required, and how similar matters are typically handled in a particular industry.

## Special Considerations

Because gathering digital data is foreign territory for most workplace investigators, it is important to at least be aware of some of the specialized issues that may arise.

### Time may be of the essence

With the ubiquity of cloud systems, important data may be overwritten—typically in 30, 60, or 90 days. Security footage is often

recycled on a regular schedule, and many clients have systems that delete emails or other data after a fixed period of time.

While litigation holds (in which a company's document destruction policies are temporarily suspended in anticipation of litigation) are not the province of neutral investigators, it is important to discuss with the client early on what data may be lost if quick action is not taken. Internal or outside experts are often key to this discussion, as well as to documenting system contents, email files, and IT policies in a timely manner.

#### Preserving the evidence

Upon receiving a complaint and identifying people involved, it may be appropriate to immediately preserve each relevant person's emails, hard drives on company laptops or desktops, smartphones, and folders used on the server.

When the client is a sophisticated enterprise, inside or outside counsel may have already issued a litigation hold or taken other steps. With smaller enterprises, the investigator may be the first person to ask about the status of preserving the data. In this con-

---

If certain dates are key, a review of social media may show a lot of personal chatter during that period.

---

text, the investigator is not advising the client on its legal obligations around preservation, but simply asking that data be maintained in support of the investigation.

A possible first step—after data sources have been identified in the brainstorming process—is to “clone” those sources, just in case they become relevant down the road. This approach gives the investigator, client, and counsel some breathing room in analyzing what searches may be worth conducting later. If digital evidence is captured before it is clear how it will be used or before it is imaged, the evidence should be put in a vault or equivalent.

The next question is who clones the data and arranges for it to be stored separately. Investigators should be aware that merely opening or printing a digital file can alter the file's metadata—simply explained as data that describe other data. For example, if someone opens a computer and starts clicking on documents, dates are changing on files and log files that may be important for analysis and may be inadvertently altered or purged. Experts call this “stomping” on the digital evidence. A familiar example is when you pull up and print a document, and the computer changes its date to the current one.

This is another warning signal to investigators to hire an outside expert, as traditional company backups are not usually able to pre-

serve data from the beginning to the end of the entire storage, as required for a dependable forensics search.

Depending on how the investigation progresses, searches may compare a person's data at the time of the interview or other event to what the person had when the forensic preservation was made. It may also be important to locate data that have been deleted.

*Example: An employee claimed that her boss was texting and sexually harassing her. Her phone and her supervisor's phone were imaged. In evaluating deleted text messages, it was found that the supervisor had deleted incriminating communications and the complainant had kept them. When the supervisor's computer was imaged, it also revealed he was surfing the net and viewing pornography, and the computer showed a pattern of such activity during the workday.*

#### Cost concerns

Digital searches and processes vary enormously in complexity and cost, so it is imperative to understand financial constraints in the beginning or as needs change, to avoid surprise or misunderstanding, as well as properly define scope. It is essential to keep the client's cost expectations well managed.

Once you have a sense of what data may be available, and have preserved it appropriately, have a candid discussion with your client about what approaches might be most cost effective, in terms of both time and expense.

One approach is to see what searches can be done fairly quickly and inexpensively. Sometimes it makes sense to start there, and then re-evaluate whether additional, more time-consuming or expensive processes may be justified. The combination of the early-retrieved digital information plus targeted interviews may aid in planning the next phase of the investigation.

#### Jurisdictional considerations

For workplace investigations requiring wide-ranging access to data, it may be important to consider regional laws. In some locales, it may be proper to simply recruit a friendly employee to whom a complainant or subject has granted social media access to pull up the content as the investigator watches, a practice known as “shoulder surfing.” In other locations, such searches may be prohibited.

The laws in other countries may be quite different from those in the United States. For example, in the European Union (EU) an employee's consent for digital evidence may be held invalid merely because of the relationship the employer has over the employee, including control over paychecks and future employment. In general, the EU operates under data minimization rules and searches may need to be conducted onsite, which may conflict with technology speed limitations. In mainland China, data cannot come back to the United States and any analysis needs to be performed locally.

## COVID-19 complications

Before COVID-19, investigators often arranged with the client for outside experts to pick up relevant employer-owned devices from the workplace, image them, then return the devices. The goal was to keep the devices long enough to preserve their content, but interfere as little as possible with their normal usage at work. Sometimes a consultant would come to the workplace to image devices of the complainant, subject, or others, without their knowledge. Usually this was done overnight.

With COVID-19, different approaches are being taken. Because many accounts are cloud-based, much of the work can be successfully performed remotely. In some circumstances, a remote collection kit can be sent via overnight courier service. It will include instructions to the employee and the name of the IT or other person who will work with the employee about the process to follow. Obviously, appropriate security precautions must be taken in all transactions.

**Example:** During COVID-19, a hiring manager saw a dramatic decrease in a full-time software developer's productivity. Without the ability to observe the worker onsite, as a starting point to see what might be amiss, the company took the unusual step of conducting a digital search. The hard drive was forensically imaged, and internet history and keywords analyzed from the browser. It was found that the employee was conducting day trading and accessing brokerage accounts on an average of 10 times a day. The analysis also revealed numerous keywords being run such as "how to trade puts and calls," "making money in the stock market," and "best stocks to make a killing."



*Sara Church Reese is an employment attorney and outside workplace investigator at SCR Investigations Inc. in Danville, California. She previously practiced both as a defense-side litigator and an in-house lawyer working to prevent and address harassment and discrimination. Co-author of*

*California Practice Guide: Civil Procedure Before Trial—Claims and Defenses, she now serves as the chair of the editorial board of the Berkeley Center for Comparative Equity and Anti-Discrimination Law blog. She can be reached at [SCR@investigations.law](mailto:SCR@investigations.law).*



*Julie Lewis is president, CEO, and founder of Digital Mountain, Inc.—a company providing global electronic discovery, computer forensic, and cybersecurity services in Santa Clara, California. She has more than 20 years of experience working in the high-tech industry in discovery, enterprise*

*storage, and data security, and has consulted on more than 1,000 cases. She is also co-founding director of the Silicon Valley Chapter of Women in eDiscovery. She can be reached at [julie.lewis@digitalmountain.com](mailto:julie.lewis@digitalmountain.com).*

## Case Law Cautions for Workplace Investigations

By Alissa Oduro, Mike Tontillo, and Sean McKinley

Workplace investigators know all too well how hard it is to honor their charge to perform consistently accurate, thorough, and lawful investigations. As if the difficulty and the pressure involved in executing proper investigations weren't enough, the legal landscape within which investigations are conducted is continually changing.

Two guiding hallmarks established decades ago in the *Cotran* case<sup>1</sup> and its progeny remain: effective investigations should be conducted reasonably well and in good faith. Offering help and direction for both investigators and those who hire them, this article has extracted three additional investigation-related takeaways that legal authorities have recently emphasized.



1. Investigate rumors, but be mindful that a formal investigation is not always necessary.
2. Assign formal investigations to an unbiased, trained, experienced investigator.
3. Review policies on confidentiality warnings in ongoing investigations; these are now permissible in some states and cases.

### Determine Whether Rumors Warrant Investigation

Deciding whether or not to investigate is particularly difficult when the catalyst for a complaint is a rumor, which can play an important but limited role in workplace investigations. A serious

rumor is often enough to launch an investigation or to steer it in a certain direction. However, employers should never take action against an employee based on an unsubstantiated rumor without first investigating its veracity.

The case of *Lunneborg v. My Fun Life*<sup>2</sup> presents a cautionary tale. In that case, the sole shareholder of a marketing company confronted his chief operating officer about a rumor that he was performing consulting work for a rival company on the side. Instead of investigating, the employer demanded that the employee immediately resign or be terminated. When the issue went to court, the shareholder's version of events was exposed as false. Further, the employer had no documentation demonstrating that the rumors had ever been investigated. In this case, the employer should at least have launched an informal investigation before taking disciplinary action.

---

## Lunneborg presents a cautionary tale about accepting rumors as true in circumstances that demand formal investigation.

---

Not all rumors warrant investigating, however. *Bain v. Wrend*,<sup>3</sup> for example, featured an antagonistic workplace dynamic between a superintendent and a teacher that arose after the superintendent was promoted to a position the teacher had wanted. After learning that the teacher had spoken disparagingly about her during a meeting with other teachers, the superintendent accused him of having an improper relationship with a student and called for a formal investigation. However, the investigation did not produce any evidence of this claim. In truth, the superintendent's only basis for the allegation was that the teacher once bought the student pizza. The court determined that the investigation was unwarranted and had been used to retaliate against the teacher. As a practical pointer, the superintendent might have informally asked a few questions about the source of the rumor before a full-scale investigation was launched in a way that could potentially tarnish the employee's reputation without any factual basis.

### Choose Unbiased, Experienced Investigators

The adequacy of an investigation can potentially hinge on whom the employer chooses as investigator. For the sake of ease or economy, an employer may be tempted to select an investigator with flimsy credentials or who already has some familiarity with the parties. However, as *Jameson v. Pacific Gas & Electric Co.*<sup>4</sup> illustrates, picking an experienced, neutral, and unbiased investigator can be critical.

In *Jameson*, the defendant-employer hired an experienced lawyer to investigate a complaint regarding workplace retaliation against an employee who reported safety violations. When the investigator concluded that no retaliation had taken place, the employee attacked the investigation, claiming the process itself had been unfair. The court underscored that the investigator had extensive experience, had interviewed 10 witnesses and provided reasons for not interviewing several more, and had produced a detailed report with her analysis and conclusions. It also noted the employee had been directed to speak to the investigator early in the process. Even though the investigator had conducted investigations for this employer in the past, the court found she could properly be deemed a neutral party and that her investigation was both thorough and fair.

Critical oversights or mistakes may also invalidate an investigation. Such oversights were made in *Lietz v. State ex. rel. Dep't of Family Services*.<sup>5</sup> In that case, the employer received a tip that an employee was abusing the employer's daycare benefits policy. Rather than hire an experienced outside entity to handle the investigation, the employer assigned the task to the employee's direct supervisor. The supervisor's investigation uncovered that the employee had been receiving benefits for days that she had been absent, resulting in an \$196.95 overpayment. However, the supervisor reached this conclusion without first hearing the employee's side of the story. The employee sued, claiming the overpayment was an innocent mistake and that the investigation had been unfair, since she was never afforded an opportunity to explain. The court found in favor of the employee, ordering her reinstatement based solely on this investigatory oversight. Despite overwhelming evidence that the employee had falsified records of her benefits, the court stated that her input should have been sought before concluding that her actions were intentional and deliberate fraud. The necessity of offering employees under investigation notice of the charges against them and the opportunity to refute them cannot be overstated—even where all other evidence points to one conclusion.

A similar pitfall occurred in *Kramer v. Wasatch County Sheriff's Office*.<sup>6</sup> That case involved a police officer who alleged that her supervising sergeant had engaged in an escalating pattern of harassment and sexually hostile conduct, culminating in rape. In response to these allegations, the sheriff did not seek an outside, neutral, or experienced party to conduct the investigation, but delegated the task to a detective—later admitting that the detective “was the unfortunate guy that was on-duty on that particular day.” When the detective concluded that no wrongdoing had occurred, the officer filed a lawsuit raising multiple claims, including a charge that the sheriff's office failed to reasonably investigate her sexual harassment, rape, and retaliation allegations. The investigator did not explore the claims with the employee, focusing instead on an alleged affair unrelated to the parties involved. The court agreed that the investigation was inadequate, noting that the detective had no training or experience in investigating sexual harassment claims and had known the alleged harasser for more



than a decade, even considering him a mentor. In addition, the county's harassment procedures were not known or communicated to the detective. The detective was not an appropriate choice for this important investigatory task.

Before employers delegate investigation-related duties to their own employees, it is absolutely necessary that they first receive adequate training and guidance. Otherwise, the employer may run into problems such as those in *EEOC v. Boh Bros. Constr. Co. LLC*.<sup>7</sup> In that case, the court determined that the employer had provided little guidance on how to investigate, document, or resolve sexual harassment complaints—instead offering only five minutes of sexual harassment training per year. As a result, the employees appointed to investigate a sexual harassment complaint conducted only “a belated and cursory twenty-minute investigation,” during which no notes were taken and the complainant's questions were ignored. Because this did not constitute an adequate, prompt, and thorough investigation, the employer was held liable for its supervisor's misconduct.

*Vandegrift v. City of Philadelphia*<sup>8</sup> further highlights the gap in competency between trained and untrained investigators. To help highlight the insufficiency of her employer's investigation, which had been conducted by a group of untrained and inexperienced employees, the plaintiff recruited a professional workplace investigator to testify as an expert witness. The investigator detailed all of the investigation's deficiencies, including the failure to investigate all possible claims, failure to interview several potentially important witnesses who did not work for the employer, and the failure to make credibility findings. The investigator also referenced the “unreasonably brief and shallow” questioning in the interviews and called into question the decision to use a team of investigators instead of one individual. The court, acknowledging the weight of this expert testimony, found in the plaintiff's favor.

### Reconsider Confidentiality Admonitions

In December 2019, the National Labor Relations Board (NLRB) issued a decision in *Apogee Retail*,<sup>9</sup> significantly expanding an employer's ability to implement policies requiring employee confidentiality during ongoing investigations. In *Apogee Retail*, the NLRB declared that for private sector employers covered by the National Labor Relations Act, these types of confidentiality policies are now presumptively lawful and that case-by-case analysis is no longer necessary.<sup>10</sup>

Obviously, maintaining confidentiality is a critically important component of conducting accurate and sufficient workplace investigations. However, requirements about confidentiality, if overly stringent, may be seen as unreasonably restricting an employee's Section 7 rights under the National Labor Relations Act. To illustrate, imagine a policy requiring all employees who have information relevant to any workplace investigation to maintain complete secrecy before, during, and after the investigation, re-

gardless of circumstance. Such a policy might be regarded as inappropriate, because it would prevent employees from discussing the underlying workplace issues that often prompt these investigations, restricting their ability to self-organize.<sup>11</sup>

In its earlier decision in 2015, *Banner Estrella Medical Center*,<sup>12</sup> the NLRB sought to strike a balance between these competing interests. The employer in *Banner Estrella* had a written policy requiring its employees to maintain complete confidentiality regarding all ongoing investigations. The NLRB struck down the employer's policy, finding this restrictive blanket confidentiality requirement unlawful. Instead, in *Banner Estrella*, the NLRB placed the burden on employers to weigh these competing interests on a case-by-case basis in order to determine exactly how much confidentiality is legitimately necessary to preserve the integrity of each particular investigation.

---

Before *Apogee Retail*, many employers found it burdensome to provide case-by-case justification for requesting confidentiality.

---

However, many employers found it burdensome to provide case-by-case justification for requesting confidentiality because these requests are typically prophylactic or precautionary and are less often motivated by any particular case-specific concern.<sup>13</sup>

Motivated in part by these practical difficulties, the NLRB reversed course in *Apogee Retail*.<sup>14</sup> Now, requiring confidentiality during an ongoing investigation is presumptively lawful for many private employers. An employer that wants confidentiality protections to continue after an investigation has concluded, however, must provide a case-specific justification for its decision in the exact manner *Banner Estrella* previously required.



*Alissa Oduro is a third-year law student at the University of Akron School of Law. In 2019, she was elected president of the Black Law Student Association and Student Bar Association Representative for the Spring Start Class of 2020. She has been a law clerk with Kastner Westman & Wilkins, LLC, a firm in Akron, Ohio, representing employers in labor and employment law, workers' compensation, and employee benefits, since the summer of 2019. She can be reached at aoduro@kwlaborlaw.com.*



*Mike Tontillo is a third-year law student at the Ohio State University Moritz College of Law. He has spent the last two summers working as a law clerk at Kastner Westman & Wilkins. In addition to his studies, he competes on Moritz's national moot court team and is a member of the University's Labor and Employment Law Association. He can be reached at [mtontillo@kwwlaborlaw.com](mailto:mtontillo@kwwlaborlaw.com).*



*Sean McKinley is a third-year law student at the Ohio State University Moritz College of Law. Before joining Kastner Westman & Wilkins in the summer of 2020, he worked in the Office of the City Attorney's Zone Initiative. At Moritz, he is involved in the Students for Sensible Drug Policy and the Black Law Student Association and is on the Diversity Committee of the Student Bar Association. He can be reached at [smckinley@kwwlaborlaw.com](mailto:smckinley@kwwlaborlaw.com).*

*Margaret A. Matejkovic, of counsel at Kastner Westman & Wilkins, and Linda S. Wilkins, of PositivelyHR, LLC, provided oversight and assistance in preparing this article.*

- 1 *Cotran v. Rollins Hudig Hall*, 948 P.2d 412 (1998).
- 2 *Lunneborg v. My Fun Life*, 421 P.3d 187 (2018).
- 3 *Bain v. Wrend*, 5:15-CV-202, 2020 WL 1316660 (D. Vt. Mar. 20, 2020).
- 4 *Jameson v. Pac. Gas & Elec. Co.*, 16 Cal. App. 5th 901 (2017).
- 5 *Lietz v. State ex rel. Dep't of Family Servs.*, 2018 WY 127 (Wyo. 2018).
- 6 *Kramer v. Wasatch Cty. Sheriff's Off.*, 743 F.3d 726 (10th Cir. 2014).
- 7 *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013).
- 8 *Vandegrift v. City of Philadelphia*, 228 F. Supp. 3d 464 (E.D. Pa. 2017). [Note that the case was decided by a summary judgment rather than a conclusion about liability.]
- 9 *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 N.L.R.B. No. 144 (2019).
- 10 NAT'L LAB. RELATIONS ACT, 29a U.S.C. §§ 203.1-203.77 (1946).
- 11 *See Costco Wholesale Corp. and Teamsters Loc. 592, Int'l Brotherhood of Teamsters*, 366 N.L.R.B. No. 9 (2018).
- 12 *Banner Health Sys. d/b/a Banner Estrella Med. Ctr.*, 362 N.L.R.B. No. 1108 (2015).
- 13 *See e.g. Dish Network LLC*, 365 N.L.R.B. No. 47 (2017) and *Costco Wholesale Corp. and Teamsters Local 592, Int'l Brotherhood of Teamsters*, 366 N.L.R.B. No. 9 (2018) (the NLRB held in both cases that the employers had violated their employees' Section 7 rights due to an inability to provide adequate justification for why they required confidentiality amid an ongoing investigation).
- 14 *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 N.L.R.B. No. 144 (2019).

## Editorial Board Welcomes Two New Members

We extend a warm welcome to two hardy souls who have agreed to lend their minds and cursors to the work of the Editorial Board of the *AWI Journal*: Sara Church Reese and Miles Grillo.

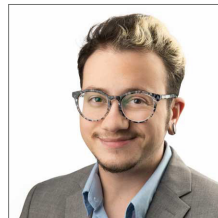


Sara Church Reese worked long and hard as a practicing litigator. "I loved litigation my whole life," Church Reese says. "It's been in my DNA. My dad was a litigator, too." But she always felt something a tad different: "From the beginning of my career, I was always good at interviewing witnesses and getting them to tell me the truth," she says. "That was my strength."

A shift away from litigating came from an unexpected source. "I became a grandmother 13½ years ago. I developed a relationship with my firstborn granddaughter that she led entirely," she says. "At the same time, I was not enjoying litigation anymore. I didn't want to argue and advocate anymore."

In 2017, Church Reese was moved to seek a credential from AWI. And in May 2019, she retired from practicing law at Gordon & Rees, and four months later, opened for business as a workplace investigator, doubling down on her interviewing skills.

In her off time, she enjoys sewing, cooking and reading—both novels and nonfiction. A current favorite read, not surprisingly: *How to Change Your Mind*, by Michael Pollan.



Miles Grillo joined Public Interest Investigations, Inc. (PII) in Los Angeles as an investigator about three years ago. A transplant from Colorado, he began work at PII as a mitigation specialist on death penalty cases. "Then I slowly charmed my way into a fulltime position," Grillo says.

"Workplace investigations are a good fit for me," he adds. "Every single one is incredibly interesting and always turns up something we've never heard before." These days, he is quickly establishing himself as an expert in using social media in investigations. In fact, the need to be tech-smart and to sleuth runs through his veins, as his previous work included stints on Apple's Genius Team and in backgrounding appeals in disability cases.

In his spare time, Grillo is teaching one of his cats, Bertram, to read—a claim that has some dog owners questioning that previous "genius" designation. "It's going pretty well, but seems to require an immense amount of encouragement and napping," he admits. "I wish I had Bertram's nap schedule."

# Partnering with Paralegals: Help for Overburdened Investigators

By Breanna Jones and Emily Getty

Every successful investigation requires having a handle on many moving parts. Communicating with clients, interviewing witnesses, reviewing documents, drafting reports—all that and more require different levels of attention during the span of an investigation. Expand that workload with multiple cases running concurrently, coupled with the operational tasks needed to keep the office lights on, and suddenly those moving parts can become too much for one person to manage effectively.

That is where paralegals can shine.

As the main assistant at an investigator's side, a paralegal can provide support in several ways, serving as a second pair of eyes and hands when needed. From document management to billing clients, paralegals can handle many tasks left on the sidelines, allowing investigators to save their time and energy to focus on the more crucial elements of investigation.

## Legal Requirements

Not just anyone can claim to be a paralegal, however; requirements, for both paralegals and those who supervise them, are set out in local laws.

For example, California's Business and Professions Code specifies qualifications for those using the title paralegal, or synonymous terms such as legal assistant and attorney assistant, or freelance, independent, or contract paralegal.<sup>1</sup> A paralegal must be qualified by education, training, or work experience. The law enumerates several ways to satisfy this requirement: a certificate of completion of an accredited paralegal program; an advanced degree and one year of legal work under a supervising attorney; or a high school diploma or equivalent and three years of legal work under a supervising attorney.

And in California, attorneys supervising paralegals must be active members of the State Bar for at least the preceding three years. In addition, if the paralegal does not have a certificate from an accredited program, the attorney must certify that the person is qualified to perform paralegal tasks. That work can include legal research, interviewing clients, gathering facts, and drafting and analyzing documents.<sup>2</sup>

There are also limitations to what paralegals can do, which are important for supervising attorneys to keep firmly in mind. California law prohibits paralegals from engaging in several activities, including:



- providing legal advice;
- explaining, drafting, or recommending the use of any legal document to or for anyone other than the supervising attorney;
- engaging in the unlawful practice of law;
- contracting with or being employed by someone other than an attorney for paralegal services; and
- establishing paralegal service fees to clients, which is the province of the hiring attorney.<sup>3</sup>

Additionally, like attorneys, paralegals have the duty to maintain and preserve client confidentiality and attorney-client privileges.<sup>4</sup> They must also complete four hours of continuing education in legal ethics and four hours of continuing education in general law or an area of specialized area of law every two years.<sup>5</sup>

The National Federation of Paralegal Associations ([www.paralegals.org](http://www.paralegals.org)) maintains a state-specific list of legal requirements for paralegals.

## Finding the Right Fit

There is no perfect combination of qualifications for a paralegal, but those who are good matches for investigation practices will have the experience, temperament, and skills that make them suited for the particulars of the work. Higher education, paralegal programs, work experience, or some combination of all three provide merits in the investigative field. Overall, what is most important is a willingness to learn, adapt, and grow; without that, a potential paralegal will struggle to keep up with investigative work, no matter the personal level of education or experience.

A background in employment law can be an asset. But if an investigator is willing to invest in a paralegal who is just entering the field, a lack of experience can be supplemented through training and other opportunities. Attending an AWI Institute, for example, can be invaluable not only for an individual paralegal, but for the investigative practice as well.

Good judgment is also key. Paralegals must be mindful of the confidential nature of their work, as well as the need to keep information privileged. They will likely communicate with clients and witnesses, and must have sound professional judgment during those interactions.

Much like investigators, excellent paralegals will have a variety of skills—paramount among them, a strong attention to detail.

While paralegals will not prepare the final analysis for a report, they need critical thinking skills for parsing through and connecting information from disparate sources. Likewise, the ability to communicate effectively, both in writing and orally, is essential.

Finally, investigators should seek paralegals who can understand and adapt to their individual work styles to maintain quality and consistency.

### Providing a Second Perspective

During an interview, an investigator’s attention must be on the witness—a single focus that can make it hard for some people to take notes.

In some situations, paralegals can attend the interview and supplement an investigator’s notes with their own. Both sets of notes can be cross-referenced for information. However, while having another perspective during an interview can provide more information, investigators cannot solely rely on their paralegal’s notes. Two notetakers gives rise to the possibility that the notes might conflict. Investigators will ultimately need to resolve any inconsistencies, and may need to follow up with witnesses for clarifications.

Whether or not they are brought into witness interviews, paralegals can help in other ways. Some workplace investigators choose to audio record their interviews so there is an exact record of what was asked and answered during an interview, while also taking handwritten notes. Paralegals can then summarize a narrative of interviews to be used in writing the report. They can also be helpful in organizing the summary by grouping ideas together by topic or arranging the interview chronologically.

### Cataloguing Cases, Managing Documents

As an investigation progresses, the number of documents in the case file mounts. While witnesses and clients alike are often eager to fill in gaps of information, they can also generate great quantities of information, creating a time sink for investigators. A systematic approach is needed to make any use of it all. Paralegals can often help with that organization work or take over doing it completely.

A paralegal can review confidential documents as they come into the office. Doing so requires a keen eye for finding information that may be pertinent to the investigation. As the list of documents grows, those details need to be summarized into an easily searchable and sortable format. Investigators may use commercially available software for this task and their paralegals will need to handle such programs efficiently. However, readily available programs such as Microsoft Excel or Access are robust alternatives.

While a paralegal should track general details of case documents and tangible items for even simple cases, a summary is very useful and can vary depending on the issues being investigated. For example, tracking the timeline of an incident may require a focus on documents containing timestamps and dates, as seen in the

sample chart below. Paralegals should also make note of potentially relevant details in each document, which can further help an investigator find specific information that much faster.

### Example of Document Cataloguing

Date	Name	Summary	Received From
7/1/2020	Grandma. Red Emails re Food Delivery	Email exchange re: food delivery scheduling and instructions; includes directions from Grandma to house in the woods; Red confirms that she will deliver lunch to Grandma’s house at 1 pm on 7/4/2020	Little Red Riding Hood
7/4/2020	Grandma. Red Texts re Food Delivery	Text exchange beginning at 11:42 am re: food delivery; Red notes she will arrive early; last text received from Grandma at 12:28 pm	Little Red Riding Hood
7/7/2020	Woodsman Report	Official memo and report re: grandma-eating incident; written and signed by Woodsman on 7/4/2020; notes that Grandma was “spit-up” by Wolf unharmed; includes statements from Red	The Woodsman

Documents will need to be scanned and originals stored properly or copied and returned to their sources. Over time, a paralegal also can act as a librarian, maintaining up-to-date databases of documents that are reliable and consistent.

### Helping Prepare Reports

Paralegals can give investigators additional support in preparing written investigative reports. Drafts require any number of edits and revisions, some of which may not be outright obvious to the writer. A paralegal can proofread drafts with a fresh set of eyes, catching anything from grammar mistakes to missing words. And because they will already be familiar with the investigation, paralegals should understand the content well enough to help determine if all the information comes together cogently.

In addition, paralegals can help save time in finding missing bits of information needed in a report, such as specific details from documents and interviews—including quotes, dates, and job titles. They could also create charts and tables for the report, such as a witness list or a timeline of events.

As an example, an investigator may hope to include a witness list in a report; however, filling in the appropriate information requires skimming through transcripts, documents, and sometimes other sources such as emails or websites. Having a paralegal perform those tasks can free the investigator to begin drafting the report rather than hunt for the details.

### Example of a Witness List

Name	Title	Age	Date of Interview
Hatter, Mad	Hatmaker	38	May 10, 2020
Hearts, Queen of	Monarch	52	May 8, 2020
Liddell, Alice	Student	7	April 30, 2020
Rabbit, White	Messenger	2	May 10, 2020

Assembling exhibits for reports can be another of a paralegal's tasks. Because they should have already been tracking relevant documents, paralegals can locate exhibits efficiently, even when a large number of exhibits are involved. A paralegal can then keep a running list of exhibits, numbering them for footnotes and date-stamping them as the report is finalized.

### Keeping the Office Running: Billing & Administration

As with any operation, an investigator's office includes duties that often are not directly tied to any one case or client. When left without proper attention, these tasks can pile up and impact investigative work. A paralegal should be ready to handle these office duties whenever needed.

For example, many investigators have standard engagement agreements they put into place with clients prior to starting investigations. A paralegal can help put together the engagement agreements, send them to the clients, and maintain a file of the agreements for reference. Once an engagement agreement is signed, the paralegal can enter that information into a client database so that billable time can be tracked as well as client-related correspondence and documents.

How a paralegal handles billing and invoices varies, however, as investigators will differ, depending on the process that works best for them. Some investigators may prefer simple methods for tracking billable hours, such as paper sheets and spreadsheets on Excel. With spreadsheets, a paralegal can manually organize all billable hours for the month by client, date, and task for an investigator to refer to as needed. Some investigators may instead use programs for tracking

hours and running invoices, such as Clio, which may require some additional technical training for the paralegal to use efficiently.

No matter the billing system in place, paralegals can also ensure the quality, accuracy, and timeliness of invoices. Much like engagement agreements, a paralegal can draft invoices for each client, paying attention to inputting correct data and calculations for determining totals. This, too, can help free investigators to focus on reviewing the final invoicing process.

In a small firm, paralegals can also help run the payroll through a provider and enter in expenses to be reimbursed. Paralegals should be prepared to know or learn how to manage programs such as Paychex for completing payroll and reimbursing expense reports, including mileage for traveling to clients.

Finally, paralegals can assist throughout the office by handling administrative tasks beyond work for clients. Resolving technical issues may require time spent researching or calling a support center, which a paralegal can easily do. A paralegal can likewise work on other tasks such as managing the firm's website, assisting in creating training materials, or scheduling business appointments such as paper shredding.

By working behind the scenes to keep the office functioning, a paralegal can provide the support needed for an investigator to focus on the larger tasks ahead, rather than stop for every minor bump that may be encountered along the way.



*Breanna Jones is a paralegal for the Law Office of Susan Woolley in Pasadena, California. For more than two years, she has assisted on workplace investigations involving claims of harassment, discrimination, and retaliation. A graduate of UC Santa Barbara, she holds a paralegal certificate from Pasadena City College. She can be reached at breanna@smwoolley.com.*



*Emily Getty, a graduate of Cal Poly, San Luis Obispo, began her career in human resources working for a high-tech company overseeing its Immigration and Relocation Program. She obtained a paralegal certificate from De Anza College in 2003 and worked for employment law litigation firms until 2017, when she joined Kramer Workplace Investigations as the firm's paralegal and office administrator. She obtained her AWI-CH certificate in 2018, and can be reached at emily@kramerlaw.net.*

<sup>1</sup> CAL. BUS. & PROF. CODE § 6454.

<sup>2</sup> CAL. BUS. & PROF. CODE § 6450.

<sup>3</sup> CAL. BUS. & PROF. CODE § 6450.

<sup>4</sup> CAL. BUS. & PROF. CODE § 6453.

<sup>5</sup> CAL. BUS. & PROF. CODE § 6450.

## CASE NOTE: *King v. U.S. Bank National Association*

### Malice Found in Deficient Investigation; Damages Award Tops \$17 Million

By Ann Boss

The recent case of *King v. U.S. Bank National Association*<sup>1</sup> is a textbook example of the alarming consequences that can result from relying on a flawed and inadequate workplace investigation.

The plaintiff, Timothy King, was a senior manager in U.S. Bank's Sacramento office. Two of his subordinates complained to human resources about King's gender discrimination and harassment, later adding complaints that he was instructing the employees to input false information into the bank's meeting reporting system. King was terminated based on human resources' investigation. The appellate court found that the investigator's failure to interview King and to analyze other witnesses' credibility constituted malice for purposes of the defamation claim and supported the award of punitive damages. In total, King was awarded more than \$17 million in compensatory and punitive damages.

#### The Investigation

There was significant evidence relating to the flawed investigation of King's alleged misconduct.

***Inexperienced investigator with no investigation plan.*** The investigator, a human resources generalist at the bank, had received no training and had read no materials on how to conduct an investigation. She had never done an investigatory plan and did not do one in this case.

***Lack of knowledge about the subject of investigation.*** The investigator failed to educate herself about the subject of her investigation—the processes and rules for inputting data into the bank's reporting system concerning “initiative meetings”—a technique that was being used to attempt to drive increased revenue.

***Failure to interview the employee who allegedly committed the misconduct.*** The investigator failed to interview the terminated employee during her investigation to confront him with the information she had obtained and allow him to explain or provide controverting evidence. She testified that she believed that she “had gathered sufficient information to make a decision with regard to his employment.”<sup>2</sup>



***Failure to analyze witness credibility and follow up on testimony inconsistencies.*** The investigator relied almost entirely on information from the two complaining subordinate employees without performing any credibility analysis on their testimony. She failed to account for the fact that the employees were having serious performance problems prior to bringing forth their allegations, which might have indicated they were biased, or that their accounts of events were not internally consistent or consistent with other witnesses' accounts. She did not conduct follow-up interviews.

***The investigator reported information that she had not investigated as facts.*** When orally reporting her investigatory findings to the bank's management, the investigator shared secondhand and thirdhand information about King's alleged role in falsifying expense reports and vacation reports that she had not investigated.

---

This case is a textbook example of the alarming consequences that can result from relying on a flawed and inadequate workplace investigation.

---

The investigator never explained her failure to make findings on the employees' initial claims of gender discrimination and harassment. Her investigation found that King had instructed his two employees to enter false information into the bank's reporting system concerning initiative meetings. She reported the results of her investigation to bank and human resources management; the bank terminated King's employment four days before he was to receive an earned performance bonus of \$260,000.

#### Trial Court Proceeding

After his termination, King sued the bank for defamation, wrongful termination in violation of public policy, and breach of the implied covenant of good faith. At trial, King explained how the initiative

meeting process worked and defined what internal and external initiative meetings meant in context. He also testified that if he had been given an opportunity to respond to the accusation that he never held any initiative meetings during his employees' tenure, he would have refuted that claim by pulling the initiative relationship review detail report and his emails and calendar, and would offer evidence from the clients whom he met with or called.

King made a detailed list of 53 internal and external initiative meetings he conducted in 2012 based on emails he had. He estimated he did hundreds of such meetings in 2011 and 2012. King denied telling his subordinate employees to falsify the initiative reports; he maintained he asked them to input only initiative meetings that had actually occurred.

The jury found in favor of King on all causes of action, awarding \$6 million for defamation, \$2,489,696 for wrongful termination, and \$200,000 for breach of the implied covenant of good faith. The jury awarded an additional \$15.6 million in punitive damages.

### The Appeal

The bank filed a motion for a new trial, claiming the damages were excessive. The trial court conditionally granted the motion premised on King's agreement to a remittitur, which he accepted, reducing the total award to just over \$5.4 million. The trial court also reduced the emotional distress damages resulting from the defamation to \$25,000 from \$1 million on the basis that the award was excessive.

The bank appealed, challenging the jury's verdicts on each claim and the remitted award of punitive damages. King cross-appealed on the trial court's reduction of his damages.

### Appellate Court Proceeding

U.S. Bank admitted on appeal that King's subordinates made several untrue statements to the investigator about his alleged instructions to falsify reports and records that were then republished to bank management.

The bank asserted that even though the statements were defamatory, they were privileged because they were not published or republished with malice. The appellate court acknowledged that the California Civil Code<sup>3</sup> provides a privilege for an employer's republication of defamatory statements because of the common interest of the employer and employees in protecting the workplace from abuse. But it noted the privilege applies only if the communication was made without malice. Actual malice can be established by showing the defendant lacked reasonable grounds to believe in the truth of the publication and acted in reckless disregard of the plaintiff's rights.

The appellate court held that while the failure to conduct a thorough and objective investigation, standing alone, generally does not prove actual malice, an investigation like the one in this case

that is a "purposeful avoidance of truth is another matter."<sup>4</sup> It found the bank's investigator in this case made a deliberate decision not to seek any information from King to contradict the allegation that he instructed the two employees to falsify initiative reports. Further, the investigator testified that "she did not care if [King] had information to refute the allegation."<sup>5</sup>

The court further concluded that the investigator deliberately did not properly investigate the additional allegation that King had falsified his vacation report. The investigator's failure to investigate and her reliance on sources known to be unreliable or biased constituted substantial evidence of malice against King for which the bank was responsible.

After finding substantial evidence to support the defamation, wrongful termination, and breach of implied covenant verdicts, the court analyzed the damages awards at issue in the case.

---

The bank terminated King's employment four days before he was to receive an earned performance bonus of \$260,000.

---

**Damages not duplicative.** The jury awarded damages arising out of the defamation and separate and additional damages as a result of the wrongful termination. The trial court had eliminated the damages awarded from the defamation claim as duplicative. The appellate court could not find as a matter of law that the jury awarded the same damages for defamation and wrongful termination, and noted that the jury had been instructed *not* to award duplicative damages. It reinstated the defamation damages award.

**Emotional distress damages not excessive.** The trial court had reduced the emotional distress damages for "shame, mortification or hurt feelings arising from the defamation" from \$1 million to \$25,000, finding the award excessive. The appellate court found that order was deficient in failing to state its reasoning, and reinstated the jury's award of \$1 million in defamation damages.

**Punitive damages based on malice.** Punitive damages may be awarded only where the jury finds oppression, fraud, or malice by clear and convincing evidence. Here, the jury found the decision to terminate King was committed with malice by an officer, director, or managing agent of the bank. The appellate court agreed, noting that the critical inquiry is the degree of discretion the employee possesses in *making* decisions, and held that the jury could have reasonably inferred that the investigator had authority and discretion to interpret and apply the bank's investigative policies.

**Punitive damages of one-to-one ratio.** The jury awarded King \$15.6 million in punitive damages, though he had initially accepted a remitted amount of \$2,714,696 before filing a cross-appeal. The appellate court reinstated the award in its entirety, making King's compensatory damages award \$8,489,696 (\$2,489,696 in wrongful termination damages and \$6 million in defamation damages). The court concluded that punitive damages in an amount equal to compensatory damages marks the constitutional limit in this case. It set the punitive damages award at \$8,489,696, a one-to-one ratio with the total damages for wrongful termination and defamation.

### Additional Proceedings in the Case

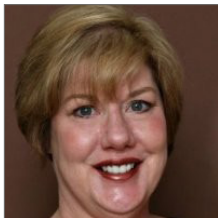
U.S. Bank filed a petition for review of the appellate decision with the California Supreme Court on September 4, which was denied on October 11, 2020.

The U.S. Chamber of Commerce filed an amicus curiae letter brief in support of U.S. Bank, claiming the appellate court's decision would result in businesses not investigating employee misconduct for fear of heightened liability. In the alternative, the Chamber asked that the decision not be published so it cannot be cited as precedent. In its October ruling, the California Supreme Court also denied the depublishation request.

### Takeaways for Investigators

This case should serve as a warning to all companies that rely on workplace investigations in making personnel decisions to use experienced and trained investigators. A trained investigator will give an individual accused of misconduct an opportunity to provide evidence refuting claimed misconduct and will analyze the credibility of all witnesses, in contrast to the investigator in this case.

Investigators should also seek to understand the reasons for any inconsistencies in witnesses' testimony either internally or externally, and conduct follow-up interviews as necessary. Failure to adhere to these practices may result in huge liability to the company, as demonstrated by this case.



*Ann Boss practices law in the Portland, Oregon area, where she specializes in workplace investigations and other labor and employment issues. She has more than 30 years of experience representing public and private sector entities in labor and employment matters, and has conducted hundreds of workplace investigations. She can be reached at [annboss1@aol.com](mailto:annboss1@aol.com).*

<sup>1</sup> King v. U.S. Bank Nat'l Ass'n, 52 Cal. App. 5th 728 (2020).

<sup>2</sup> Id. at 739.

<sup>3</sup> CAL. CIV. CODE § 47.

<sup>4</sup> King v. U.S. Bank Nat'l Ass'n, 52 Cal. App. 5th 728, 754 (2020), citing Reader's Digest Ass'n v. Superior Court, 37 Cal.3d 244, 258 (1984).

<sup>5</sup> Id. at 755.

## Mailing Panel

# THANK YOU TO OUR 2020 AWI VIRTUAL CONFERENCE SPONSORS

